88-2012(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSEPH L. LAMONTAGNE,

Petitioner,

– against –

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether ERISA's fiduciary standards, which became effective on January 1, 1975, apply to all denials of benefits occurring on or after that date, as held by the Third, Fourth, and Fifth Circuits, and as maintained by the United States Department of Labor; or whether their applicability depends on a case by case analysis of the "significant facts" of each denial, as held by the First, Second, Seventh, Eighth and Ninth Circuits?

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Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Joseph L. Lamontagne prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Second Circuit entered in this case on February 27, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit dated February 24, 1989, reported at 869 F.2d 153, is set forth at Appendix A herein. The opinion of the District Court for the Southern District of New York, dated July 7, 1988, is not officially reported, and is set forth at Appendix B herein.

JURISDICTION

The order of the Court of Appeals for the Second Circuit was dated and entered on February 27, 1989. Petitioner filed a timely motion for rehearing, which was denied on March 17, 1989, in an order set forth at Appendix C herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional provisions invoked in this petition. The federal statutory provision involved is the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). The relevant texts of that statute are set forth at Appendix D herein.

STATEMENT OF THE CASE

Petitioner became a participant in respondent multi-employer pension plan in 1954. In late 1971 he became injured on the job and permanently disabled from performing covered employment.

In November 1986, at age 66, petitioner applied to respondents for a "reduced pension," which required the attainment of age 65. He also applied for a "grace period" to bridge a "break in service" that occurred on December 31, 1974, seventeen

days before his attainment of age 55, when his right to a pension would have vested under the terms of the plan.*

By a letter dated December 3, 1986, however, respondents refused to consider petitioner's application, on the ground that their prior denial of a disability pension in 1978 "was determinative of all pensions that Mr. Lamontagne was, or could

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*Pursuant to the Plan, a participant's pension credits were cancelled if he suffered a "break in service" before age 55. The occurrence of the "break," however, could be delayed for up to two years if the failure to work was due to disability. Such delay was referred to as a "grace period." When "extenuating circumstances" were present, as detailed in petitioner's 1986 pension application, there was no deadline for the award of the "grace period." Petitioner needed a "grace period" of only 17 days for his right to a pension to vest. The Second Circuit, however, never reached the merits of his claim that respondents' refusal to award a "grace period" breached ERISA's fiduciary standards, because the Court held those standards inapplicable.

have been, eligible for."*

Petitioner filed this suit on January 6, 1987, claiming that respondents' December 3, 1986 denial of a pension violated, inter alia, ERISA's fiduciary standards set forth at Section 404(a) of ERISA, 29 U.S.C.

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*On April 13, 1978, at age 58, petitioner had applied for a disability pension. By letter dated November 14, 1978 he was informed that his application was denied, but was given no reason for the denial of a disability pension. Instead, the letter explained that he was not eligible for an early retirement pension, for which he had not applied, due to a "break in service of 5 years." The letter did not inform petitioner, however, that, due to his disability, he was entitled to apply for a "grace period." The Summary Plan Description also failed to describe the "grace period," contrary to the requirement of Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1), and 29 C.F.R. § 2520.102-3. Consequently, petitioner, who was unrepresented and did not know about the "grace period," took no further action until, after consulting counsel in 1986, he filed an application for a "reduced" pension and applied for a "grace period." A "reduced pension," unlike an "early retirement pension," which is payable on or after age 55, is payable at age 65, and, therefore, is not actuarially reduced.

§ 1104(a).*

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*It is petitioner's claim that respondents' 1986 denial of a "reduced pension" breached ERISA's fiduciary standards, for three reasons. First, the 1978 denial letter, on which the 1986 decision was based, failed to comply with ERISA's claim denial procedure, and thus violated ERISA's fiduciary standards. Massa. Mut. Life Ins. v. Russell, 473 U.S. 134 (1985) at 153 (Brennan, J., concurring). That procedure, set forth at Section 503 of ERISA, 29 U.S.C. § 1133, is further detailed at 29 C.F.R. § 2560.503-1(f). It provides, in relevant part, that, upon denying a claim, a plan administrator must provide to a claimant "[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary." 29 C.F.R. § 2560.503-1(f)(3). In failing to inform petitioner that, due to his disability, he was entitled to a "grace period," respondents violated that regulation. See, e.g., Wolfe v. J.C. Penney Co., 710 F.2d 388, 392 (7th Cir. 1983) ("Describing additional information needed and explaining its relevance, as required by subsection (3) of 29 C.F.R. § 2560.503-1[f], enables a participant ... to gain a meaningful review by knowing with what to supplement the record.") Because the 1978 denial letter violated ERISA, it was ineffective, and could not justify respondents' denial of petitioner's 1986 application for a "reduced pension." Second, respondents also violated ERISA's

(Footnote continued on following page.)

On the respondents' motion to dismiss the complaint and for summary judgment, the District Court dismissed the complaint, holding that ERISA's fiduciary standards did not apply to petitioner's claim. On appeal, the Second Circuit affirmed. It identified the issue to be "whether the alleged act or omission central to Lamontagne's fiduciary standards claim occurred before January 1, 1975." (A-5)* It then held that the "central act" was "the Fund's adoption of the break in

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(Footnote Cont'd)

fiduciary standards by refusing to entertain petitioner's 1986 application for a "grace period," even though such application had never been made before. Third, although petitioner had never before applied, or been eligible to apply, for a "reduced pension," respondents stated that their 1978 denial of a disability pension to petitioner "was determinative of all pensions that Mr. Lamontagne was, or could have been, eligible for."

*All references to (A-) are to the Appendix to this petition.

employment policy." (A-6)

Consequently, the Court, relying on Section 514(b)(1) of ERISA, 29 U.S.C. § 1144(b)(1), held that ERISA's fiduciary standards were not applicable to respondents' December 3, 1986 pension denial, and affirmed the dismissal of that claim.

REASONS FOR GRANTING THE WRIT

The writ should be granted in order to resolve a clear conflict between two groups of Circuits, on the important issue of the application of ERISA's fiduciary standards.

In this action the Second Circuit has aligned itself with the First, Seventh, Eighth, and Ninth in holding that, where the "alleged act or omission central to ... [the] fiduciary standards claim occurred before January 1, 1975" (A-5), the denial is not reviewable pursuant to ERISA's

fiduciary standards, even though the denial itself occurred on or after January 1, 1975.

By contrast, the Third, Fourth and Fifth Circuits have held, and the United States Department of Labor has maintained, that a denial of benefits is always reviewable under ERISA's fiduciary standards when the denial occurs on or after January 1, 1975.

The irreconcilable approaches taken by the two groups of Circuits would cause petitioner's claim to have different outcomes, depending on the Circuit Court considering it, thus encouraging forum shopping. It is exactly this type of conflict among the Circuits that requires this Court to assume jurisdiction over this petition and establish the correct reading of the statute in question.

A. The Circuit Courts Are Split Into Two Groups

The eight Circuit Courts that have had occasion to rule on the applicability of ERISA's fiduciary standards to a denial of benefits occurring on or after January 1, 1975, have focused their analyses on whether the "act or omission" central to the alleged fiduciary breach occurred before, or on or after January 1, 1975.

The reference to "act or omission" is found in Section 514 of ERISA, 29 U.S.C. § 1144, which provides, in relevant part:

> Other Laws
>
> Supersedure; effective date
>
> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter... shall supersede any and all

> State laws insofar as they may now or hereafter relate to any employee benefit plan ... This section shall take effect on January 1, 1975.
>
> Construction and application
>
> (b) This section shall not apply with respect to any action which arose, or any act or omission which occurred, before January 1, 1975.

All Circuits that have considered the question have agreed that, before ERISA's fiduciary standards can be held applicable, a double inquiry is necessary, to determine both whether "any action ... arose, or any act or omission ... occurred, before January 1, 1975."

Because all Circuits have held that an action "arises" pursuant to ERISA upon the denial of a pension application, ERISA's fiduciary standards have been held inap-

plicable where such denial takes place before January 1, 1975. When the denial takes place on or after January 1, 1975, however, the Circuit Courts have split as to whether those standards should be applicable to all such denials. The split is based on differing interpretations of "act or omission."

It is conceded by all Circuits, as stated by the Eighth, that "[t]he legislative history behind the phrase 'act or omission' is sparse." Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307, 313 (8th Cir. 1979), and that, therefore, "'it is not at all clear what acts and omissions Congress referred to in § 514(b)(1) ... '", id., quoting from Bacon v. Wong, 445 F.Supp. 1189, 1192 (N.D. Cal. 1978).

As a consequence, the Circuits have split into two groups with irreconcilable

interpretations.

(1) The first group of Circuits

The first group has interpreted "act or omission" to refer to "those significant facts which give rise to a claim but which fall short of establishing a cause of action." Winer, supra, 593 F.2d at 313. Under this approach, the courts must examine the "significant facts" of each claim (also referred to as the "central" or "critical" acts) to determine, on a case by case basis, whether ERISA's fiduciary standards are applicable. The Circuits that have adopted this approach are the First, Second, Seventh, Eighth and Ninth. See: Cowan v. Keystone Emp. Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978) ("Cowan"); Quinn v. Country Club Soda Co., 639 F.2d 838 (1st Cir. 1981) ("Quinn"); Lamontagne v. United Wire, Metal & Mach. Pension Fund,

869 F.2d 153 (2nd Cir. 1989) ("Lamontagne"); Coward v. Colgate-Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), cert. den., 460 U.S. 1070 (1983) ("Coward"); Winer v. Edison Bros. Stores Pension Plan, 593 F.2d 307 (8th Cir. 1979) ("Winer"); Landro v. Glendenning Motorways, 625 F.2d 1344 (8th Cir. 1980) ("Landro"); Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984) ("Menhorn"); Lee v. Garrett, 803 F.2d 1082 (9th Cir. 1986); Smith v. Retirement Fund Trust, 857 F.2d 587 (9th Cir. 1988).*

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*Even among the first group of Circuits, however, there is no agreement on whether a pre-1975 break-in-service, rather than the post-1975 denial of benefits based on that break, is the "significant fact." In Coward, supra, the Seventh Circuit held that a class of plaintiffs who had suffered a pre-1975 break in service due to layoff, could rely on ERISA's fiduciary standards in challenging a 1976 pension denial. The Seventh Circuit rejected the defendant's argument that the "critical 'act' for purposes of ERISA, 29 U.S.C. § 1144, was the

(Footnote continued on following page.)

Where, as a result of an examination of the "significant facts," courts in this group conclude that ERISA's fiduciary standards are not applicable to the claim, they are further sub-divided in two sub-groups. The first sub-group will dismiss the action for want of federal jurisdiction. To this sub-group belong the First Circuit (Cowan, Quinn, supra), the Seventh (Coward, supra), and the Ninth (Menhorn, Lee, Smith, supra).

The second sub-group, holding it has jurisdiction to apply State law, will pro-

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(Footnote Cont'd)

employees' termination from the plan as a result of their extended layoffs." Coward, 686 F.2d at 1234. It held, instead, that the "critical act ... was the denial of plaintiff's application for pension benefit credits..." Id. That decision is indistinguishable from the decision in the case at bar, where, pursuant to Coward, the Plan's 1986 denial of benefits would be the "critical act," not the pre-1975 break in service.

ceed to adjudicate the claim. The Circuits adhering to this holding are the Second (Lamontagne, supra),* and the Eighth (Winer, supra, and Landro, supra).

(2) The second group of Circuits

The second group of Circuits has focused, instead, on the date of denial of benefits, holding that all denials of pension benefits on or after January 1, 1975 are subject to ERISA's fiduciary standards. Tanzillo v. Local Union 617, I.B. of T., 769 F.2d 140 (3rd Cir. 1985) ("Tanzillo"). The Circuits so holding, in addition to the Third, are the Fourth and the Fifth. See: Woodfork v. Marine Cooks

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*In the action at bar, however, the Lamontagne court, after it found ERISA's fiduciary standards inapplicable, inexplicably did not proceed to apply State law.

& Stewards Union, 642 F.2d 966 (5th Cir. 1981) ("Woodfork"); Degan v. Ford Motor Co., 869 F.2d 889 (5th Cir. 1989) ("Degan"); Rodriguez v. MEBA Pension Trust, 872 F.2d 69 (4th Cir. 1989) ("Rodriguez").

This second group of Circuits has emphatically disavowed the approach taken by the first group, and, even where one of its holdings could be distinguished on its facts, has flatly refused to do so. See, e.g., Tanzillo, supra, at 144, n.3 ("we prefer to disavow Menhorn rather than to rely on its distinguishing characteristics.")

This second group of Circuits has arrived at its holding by two different routes, and is, therefore, subdivided in two subgroups. The first subgroup, composed of the Fifth Circuit, has reasoned that, given the lack of guidance from

Congress, it "must therefore divine specific statutory meaning from general statements of Congressional intent and the rules of statutory construction." Woodfork, supra, 642 F.2d at 970. The Court then held:

> A basic principle of statutory construction is that "a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." [Citations omitted] ... [A]ny cause of action arising before 1975, by definition, must be based on acts or omissions occurring before 1975. Thus, the cause-of-action exception would have independent significance only if it applies in contexts to which the act-or-omission exception is inapplicable.

Woodfork, supra, 642 F.2d at 970-971.

The Fifth Circuit, therefore, has limited the use of the "act or omission" exception to "acts or omissions that set in motion legal proceedings other than causes

of action." Id., at p. 971.

Examples of such proceedings preempted by ERISA are "pension-related state administrative proceedings and criminal prosecutions, which certainly cannot be characterized as causes of action." Woodfork, supra, at 971, citing as an example of such proceedings Azzaro v. Harnett, 414 F.Supp. 473 (SDNY 1976), aff'd, 553 F.2d 93 (2d Cir. 1977), cert. den., 434 U.S. 824 (1977). Woodfork's holding and rationale were reaffirmed very recently in Degan, supra. Consequently, in the Fifth Circuit the "act or omission" test is relevant only for civil or criminal proceedings brought by State authorities under State law.

The second sub-group, composed of the Third and Fourth Circuits, has interpreted "act or omission" to mean the grant or

denial of pension benefits.

> While the determination of a claim upon the Fund may require the Fund trustees to consider events that have taken place before ERISA's enactment, the act of granting or denying a pension nevertheless involves a contemporaneous construction of the plan's provisions - an "act or omission" to which ERISA's fiduciary standards apply, and, by extension, over which the district courts are unquestionably given jurisdiction.

Tanzillo, supra, 769 F.2d at 144; Rodriguez, supra.

Although by two different routes, all Circuit Courts in the second group agree that, where a denial of benefits occurs on or after January 1, 1975, the denial is reviewable pursuant to the fiduciary standards of ERISA. As will be discussed below, the United States Department of Labor agrees with this second group of

Circuits.

B. The United States Department of Labor Agrees With the Second Group of Circuits

In its brief before the Eighth Circuit in Winer, supra, the United States Department of Labor took the position taken by the second group of Circuits, namely the Third, Fourth, and Fifth, that the applicability of ERISA's fiduciary standards depended exclusively upon the date of benefit denial. It reached that conclusion by a still different route, however, because it maintained that the phrase "act or omission" was never intended by Congress to apply to the conduct of participants or beneficiaries, but only to the conduct of fiduciaries.

The Department found support for its conclusion in the overall structure of ERISA, and in the purpose of Section

514(b). Brief of Ray Marshall, Secretary of the United States Department of Labor, Plaintiff-Appellee, at 32-35, in Marshall v. Edison Bros. Stores Pension Plan, reported as Winer, supra, (No. 78-1328). The Secretary's interpretation is set forth below.

(1) The Structure of ERISA

As stated by the Department of Labor, "[a] central purpose of ERISA is to regulate fiduciary conduct in order to protect the rights of plan participants." Id., at p. 32. Subsection 2(b) of ERISA, 29 U.S.C. § 1001(b), states that the

> policy of this Act [is] to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appro-

priate remedies, sanctions, and ready access to the Federal courts.

Part 4 of Subchapter I, entitled "Fiduciary Responsibility," sets forth the "standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," as described above in § 2(b). Nowhere in the statute is there any part setting forth "participant responsibility" provisions. Part 5 of Subchapter I -- "Administration and Enforcement" -- provides for ERISA § 2(b)'s "appropriate remedies, sanctions and ready access to the Federal Courts," so that participants, beneficiaries, the Secretary, and fiduciaries (suing their co-fiduciaries) may enforce the substantive duties imposed by the Act on fiduciaries. See, ERISA § 502(a), 29 U.S.C. § 1132(a).

In keeping with the statute's regu-

lation of fiduciary conduct, Congress throughout the fiduciary responsibility provisions used the phrase "acts or omissions" to refer to fiduciary breaches. For example, § 405(a)(1), 29 U.S.C. § 1105(a)(1), provides that a fiduciary shall be liable for a breach of fiduciary responsibility of another fiduciary,

> if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach; ... (emphasis added)

Similarly, in §§ 405(b)(1)(B), 405(b)(3)(A), 405(c)(2), 405(d)(1), and 410(b)(1), 29 U.S.C. §§ 1105(b)(1)(B), (b)(3)(A), (c)(2), (d)(1), and 1110(b)(1), the phrase "acts or omissions" refers consistently and exclusively to fiduciary conduct. Other than these sections and Section 514(b)(1), the term "acts or omissions" appears nowhere

else in Subchapter I, except in Section 108, 29 U.S.C. § 1028 of Part 1 which also regulates the reporting and disclosure requirements of fiduciaries. That particular section, although not contained in Part 4, which regulates the conduct of fiduciaries, is entitled "Reliance [by fiduciaries] on administrative interpretations."

An established maxim of statutory construction provides that where the same phrase is used in different parts of a statute, it is presumed, absent any clear indication to the contrary, that the phrase be used in the same sense throughout; and where the meaning of the phrase is clear in one instance, the same meaning will be given to it elsewhere in the statute. Barnson v. U.S., 816 F.2d 549, 554 (10th Cir. 1987), cert. den., ____ U.S. ____, 108 S.Ct. 229 (1987). That principle applied

here requires the conclusion that Congress, having used the phrase "acts or omissions" to refer only to fiduciary conduct in §§ 405, 410 and 108, must have intended that the same term be applied in the same sense in § 514(b)(1).

(2) The Purpose of Section 514(b)(1)

Applying the phrase "acts or omissions" to fiduciary, not participant conduct, also makes sense in light of the purpose of § 514(b)(1). The essential purpose of the § 514(b)(1) effective date is to prevent the pre-ERISA conduct of defendants from being judged according to post-ERISA standards. Because Subchapter I of ERISA does not regulate the conduct of participants, the purposes of Subchapter I and the protections afforded by § 514(b)(1) are not advanced if the term "acts or omissions"

in § 514(b)(1) is applied to such conduct. On the other hand, ERISA does regulate fiduciary conduct, and therefore § 514(b) can be sensibly applied to prevent application of new statutory obligations on "acts or omissions" of fiduciaries occurring prior to the statute's effective date.

C. The Reading by the United States Department of Labor Is the Only Correct Reading of ERISA

Quite apart from the deference due a reading of a statute by the agency entrusted with its administration, see, e.g., Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-845 (1984), the Department of Labor's reading is correct because, (1), it is required by the canons of statutory construction; (2) because a contrary reading would lead to

anomalous results; and (3), only the Department's reading is consistent with ERISA's purpose.

(1) The Department of Labor's reading of ERISA is supported by the canons of statutory construction

As this Court has admonished, "statutory language cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Davis v. Michigan Dept. of Treasury, ____ U.S. ____, 103 L.Ed.2d 891, 901 (1989).

The meaning of "act or omission" is best understood, therefore, when it is read in pari materia with the provisions of Part 5 of Subchapter I of ERISA, where § 514 (b)(1) is found. Entitled "Administration

and Enforcement," that Part, as its name implies, provides not only access to the federal courts for participants and beneficiaries whose causes of action "arise," but also for civil and criminal proceedings to be brought by the Secretary of Labor.* As noted by the Woodfork court, such proceedings are set in motion by an "act or omission," and "cannot be characterized as causes of action." Woodfork, supra, 642 F.2d at 971.

Furthermore, as pointed out in Woodfork, and reiterated in Degan, under the Second Circuit's interpretation, "it

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*See, e.g., Section 501, 29 U.S.C. § 1131 ("Criminal Penalties"); Section 502, 29 U.S.C. § 1132, ("Civil enforcement", several subsections of which provide for civil enforcement by the Secretary of Labor); Section 504, 29 U.S.C. § 1134 ("Investigative authority"); Section 510, 29 U.S.C. § 1140 ("Interference with protected rights"); Section 511, 29 U.S.C. § 1141 ("Coercive interference").

would not matter when the cause of action arose so long as the relevant acts or omissions occurred prior to 1975." Degan, 869 F.2d at 894. Consequently, such interpretation "would render the first clause of section 1144(b)(1) superfluous," id., a result that runs counter to the most fundamental canon of statutory construction.

(2) The reading of ERISA by the first group of Circuits leads to anomalous results.

Unless the reference to "act or omission" is to the conduct of fiduciaries (whose duties are set forth at Part 4 of Subchapter I), there is no principled way to apply those words only to Part 4. If they are applied to Part 1 ("Reporting and Disclosure"), Part 2 ("Participation and Vesting"), and Part 3 ("Funding") of the same Subchapter, they would lead to

anomalous results. This is so because each of those Parts, in addition to containing one or more effective dates,* also contains very carefully calibrated "applicability" provisions, specifically geared to each part.** To superimpose the "act or omission" test would create the anomalous situation of specific, targeted provisions being modified, in blunderbuss fashion, by a general one, leading to great uncertainty as to the applicability of any of ERISA's regulatory provisions contained in Subchapter I. An example will best illustrate

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*The "effective date" of Part 1 is contained in Section 111, 29 U.S.C. § 1031; that of Part 2 is contained in Section 211, 29 U.S.C. § 1061; and that of Part 3 is contained in Section 306, 29 U.S.C. § 1086.

**See, e.g., Section 211(a), (b)(1), (2), (c)(1), (d), 29 U.S.C. § 1061(a), (b)(1), (2), (c)(1), (d), of Part 2; and Section 306(a), (b), (c)(1), (d) and (e), 29 U.S.C. § 1086(a), (b), (c)(1), (d) and (e), of Part 3.

that that was not Congress' intent.

Section 203(b)(1)(F), 29 U.S.C. § 1053(b)(1)(F), of Part 2 provides that, in computing the period of service under the plan for purposes of determining vesting, fiduciaries acting after the effective date of Part 2, may compute a participant's years of credited service on the basis of plan rules which were in effect when such service or breaks in service occurred.

Congress, therefore, evidently made a choice as to which pre-ERISA plans provisions were authorized to be imposed by fiduciaries after ERISA's effective date - and did so explicitly by specifying them. Other provisions were not so authorized, not so specified, and therefore must conform to ERISA standards.

(3) The Department of Labor's reading, unlike that of the first group of Circuits, is consistent with ERISA's intent to extend its protections to all employees as soon as practicable

As pointed out by the Degan court,

> the preemptive provisions of ERISA are "deliberately expansive, and designed to 'establish pension plan regulations as exclusively a federal concern.'" Pilot Life [v. Dedeaux], 481 U.S. [41,] at 46, 107 S.Ct. at 1552 (quoting Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 523, 101 S.Ct. 1895, 1906, 68 L.Ed.2d 402 (1981)). A logical corollary to this maxim is that the statutory exceptions to ERISA's preemptive reach should be construed narrowly.

Degan, supra, 869 F.2d at 894, note 7.

The Second Circuit's reading of the exception to the supersedure provision, however, is very broad, because it renders ERISA's fiduciary standards inapplicable to all pension denials, regardless of their

date, as long as the "significant" "act or omission" occurred before January 1, 1975. Based on this theory, it does not matter when a pension applicant is last employed. In Lee, in fact, the plaintiff's employment did not terminate until March 1984; in Menhorn, until June 1980; in Quinn, until November 1976; in Winer, until May 1976; in Landro, until 1977.

Yet, that indifference to the actual date of retirement and to the date of the benefit denial, is "inimical to the Congressional attempt to extend the protections of ERISA to all employees as soon as practicable." Winer, supra, 593 F.2d at 313.

The result of the Second Circuit's reading of the exception to ERISA's supersedure provisions is to postpone indefinitely the applicability of ERISA's fidu-

ciary and other standards. There is nothing in either the language or legislative history of ERISA that lends any support to such indefinite postponement.*

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In sum, the conclusion is inescapable that the correct reading of "act or omission" is the one provided by the United States Department of Labor, to the effect that those words refer only to acts or

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(Footnote Cont'd)

*See also: Menhorn, supra, 738 F.2d at 1507, where the dissenter noted: "Presumably, had Menhorn's employment not terminated, the majority approach would also deny Menhorn his right to a federal forum to clarify his rights under Firestone's pension plan if the clarification he sought was what effect his 1967 break-in-service would have on his pension rights. Such a construction is at odds with ERISA's express provision of a federal forum to clarify a participant's right to future pension benefits. See 29 U.S.C. § 1132(a)(1)(B)."

omissions of fiduciaries.

Thus, the only pension denials to which ERISA's fiduciary standards are not applicable are those which occurred before January 1, 1975. Because petitioner was denied a "reduced pension" in 1986, the fiduciary standards of ERISA are applicable to review that denial, contrary to the holding of the Second Circuit, and of the other Circuits in the first group, namely the First, Seventh, Eighth and Ninth.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: June 7, 1989

Respectfully submitted,

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APPENDIX

APPENDIX A Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 510—August Term, 1988

(Argued: December 15, 1988

Decided: February 24, 1989)

Docket No. 88-7703

JOSEPH L. LAMONTAGNE,

Plaintiff-Appellant,

—v—

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Defendants-Appellees.

Before:

MESKILL, PIERCE and MINER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Mary Johnson Lowe, *J.*) which dismissed appellant's complaint on

the grounds (1) that the district court lacked subject matter jurisdiction over appellant's ERISA claims and (2) that appellant's Taft-Hartley claim was time-barred.

Affirmed.

EDGAR PAUK, ESQ., New York, N.Y. (Legal Services for the Elderly, New York, N.Y.), *for Plaintiff-Appellant.*

ARTHUR N. LAMBERT, ESQ., New York, N.Y. (Brian M. Levy, Susan E. Jaffee, Lambert & Weiss, New York, N.Y., of counsel), *for Defendants-Appellees.*

PIERCE, *Circuit Judge*:

Joseph L. Lamontagne appeals from a judgment of the United States District Court for the Southern District of New York, Judge Mary Johnson Lowe, which dismissed his complaint on the grounds (1) that the district court lacked subject matter jurisdiction over his Employee Retirement Income Security Act ("ERISA") claims and (2) that his Taft-Hartley Act claim was time-barred. We affirm.

BACKGROUND

The Pension Plan ("the Plan") of the United Wire, Metal & Machine Pension Fund ("the Fund"), as amended through 1970, in Article I, § 7, defines "Covered Employment" as employment in which the employee

earns credit towards a pension to be supplied by the Fund. Lamontagne worked in covered employment as a machinist from 1954 to 1971. On September 7, 1971, when he aggravated a back injury, Lamontagne left his job and never again returned to covered employment.

According to Article III, § 5(b) of the Plan, an employee's failure to work at least 800 hours in covered employment within a period of two consecutive calender years, termed a "break in employment," results in the cancellation of the employee's previously earned pension credit. Section 5(c) provides for an exception to the break in employment policy; it states that an absence from covered employment shall *not* be considered a break in employment if the employee is absent from work due to a total disability and the trustees of the Fund grant the employee's application to have the period of his absence recognized as a "grace period."

The Fund offers four types of pensions: Normal, Early Retirement, Reduced and Disability. *See* Article II. As set forth in Article II of the Plan, an employee must have accumulated pension credit for at least fifteen years to be eligible for any one of these pensions.

More than six years after leaving his job, on April 19, 1978, Lamontagne applied to the Fund for a Disability Pension. In a letter to Lamontagne dated November 14, 1978, the Fund's administrator responded; he wrote:

> On Monday, November 6, 1978, the Board of Trustees of the United Wire, Metal and Machine Pension Fund denied your application for pension benefits for failure to meet the requirements for either a Disability or Partial Pension from the Fund.

> . . . [A]t the time of your termination you were 52 years of age. To be eligible for an Early Retirement Pension then you had to be 55 years of age. Therefore todate [sic] you had incurred a break in service of 5 years since you failed to work at least 800 hours in covered employment within any period of two consecutive calendar years. See page 11 of the enclosed pension book.

Eight years later, on or about November 7, 1986, Lamontagne again applied for a pension from the Fund. This time the type of pension for which he applied was a Reduced Pension. Again, the Fund denied Lamontagne's application. In a letter to Lamontagne dated December 3, 1986, the Fund's attorney wrote that the Fund's trustees "declined the reconsideration of their determination of 1978 which found that a break-in-service occurred."

Following the denial of his second application for a pension, Lamontagne commenced this suit against the Fund in the United States District Court for the Southern District of New York. In a complaint dated January 6, 1987, Lamontagne alleged that the Fund denied him a pension in violation of ERISA, 29 U.S.C. § 1104(a) (1982) ("fiduciary standards claim" and 29 U.S.C. § 1053 (Supp. IV 1986) ("vesting standards claim"); in violation of the terms of the Plan ("Plan violation claim"); and in violation of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5) (1982) ("Taft-Hartley claim"). In a judgment dated July 19, 1988, pursuant to the Fund's motion to dismiss the ERISA claims for lack of subject matter jurisdiction and the Fund's motion for summary judgment on the Taft-Hartley claim based on the statute of limitations, the district court dismissed the complaint. In her memorandum opinion and order, Judge Lowe held that the court

lacked subject matter jurisdiction over Lamontagne's ERISA claims and that Lamontagne's Taft-Hartley claim was time-barred. While Judge Lowe did not explicitly discuss Lamontagne's Plan violation claim, she alluded to it and effectively dismissed it in a footnote. This footnote read: "Because plaintiff never had a vested right to a pension under either a pre-ERISA or ERISA plan, the Court need not consider . . . those cases which hold that ERISA provides a federal forum for wrongful termination of benefits which vested prior to ERISA's effective date."

DISCUSSION

A. *Fiduciary Standards Claim*

Title 29 U.S.C. § 1144(b)(1) (1982) provides that the fiduciary standards section of ERISA "shall not apply with respect to any cause of action which arose, or *any act or omission* which occurred, before January 1, 1975." (Emphasis added.) The issue here, which the district court decided in the affirmative, is whether the alleged act or omission central to Lamontagne's fiduciary standards claim occurred before January 1, 1975.

In *Baum v. Nolan*, 853 F.2d 1071 (2d Cir. 1988), this court affirmed the district court's dismissal of a suit by participants in a Teamsters pension fund. These participants claimed that the trustees of the fund in 1973 breached their fiduciary duty under ERISA by entering into an agreement to merge the Teamsters pension fund with a pension fund for brewery workers without making adequate inquiry into the financial soundness of the brewery workers' fund. Further, they alleged that the trustees continued to breach their fiduciary duty after 1975 by using Teamsters fund assets to pay benefits to brewery

workers. *Id.* at 1074-75. The court held that under § 1144(b)(1), ERISA did not apply to the participants' cause of action, since the merger agreement and the trustees' alleged failure to inquire about the financial soundness of the brewery workers' fund occurred before January 1, 1975. *Id.* at 1075. The fact that the merger "generate[d] consequences after ERISA's effective date," namely, the post-1975 payments to brewery workers, did not make the merger actionable under ERISA. *Id.*

In *Baum*, the court identified the act and omission which were central to the case, and those events which were merely the consequence of the act and omission, and held that only the former were relevant for § 1144(b)(1) purposes. Here, as Judge Lowe found, the act central to Lamontagne's case was the Plan's pre-1975 adoption of the break in employment policy. This policy required the Fund to deny Lamontagne's pension application in 1978, since Lamontagne had failed to obtain covered employment at any time after September 1971. Given Lamontagne's employment history, the 1978 denial of his pension application was merely a consequence of the Fund's adoption of the break in employment policy. The relevant act for § 1144(b)(1) purposes—the Fund's adoption of the break in employment policy—occurred before 1975. Therefore, the fiduciary standards section of ERISA does not apply to Lamontagne's claim and the ruling by the district court in dismissing it was correct.

Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496 (9th Cir. 1984), a case cited with approval by *Baum*, 853 F.2d at 1075, is even more on point. In *Menhorn*, the Ninth Circuit held that a district court lacks subject matter jurisdiction over a pension applicant's claim that his employer violated the fiduciary standards section of

ERISA by denying his application, when the denial was merely the "inexorable consequence" of pre-1975 events. 738 F.2d at 1502. The employee in *Menhorn* had incurred a break in employment in 1967. The court held that the employer's post-1975 denial of his application for a pension was the direct result of the employer's pre-1975 adoption of a break-in-service policy and its warnings to him that a break in employment would terminate his previously earned credits. *Id.* Here, as in *Menhorn*, the denial of the pension application followed inexorably from the pension fund's pre-1975 adoption of its break in employment policy. Consequently, the district court's dismissal of the claim herein was proper.

On appeal, Lamontagne argues that the Fund's denial of his application was not an inexorable consequence of the break in employment policy because the trustees of the Fund had to exercise discretion in deciding whether or not to recognize his absence from covered employment as a grace period. Under Article III, § 5(c) of the Plan, an employee must apply in writing to the trustees of the Fund to have the period of absence from work recognized as a grace period. Nothing in the record indicates that Lamontagne made such an application before the Fund's 1978 denial of his pension application. Lamontagne claims that at the time of his 1986 application for a Reduced Pension, he also applied to have his absence from covered employment recognized as a grace period. It is unclear from the record whether he did apply for a grace period. However, even if he did, such an application, made in 1986, years after the event, would have no bearing on whether the Fund's 1978 denial of his pension application was inexorable. Therefore, no discretion was involved in the trustees' 1978 decision to consider Lamontagne's absence from

covered employment as a break in employment, and not as a grace period.

B. *Vesting Standards Claim*

For those pension plans in existence on January 1, 1974, the vesting standards section of ERISA, 29 U.S C. § 1053, "shall apply in the case of plan years beginning after December 31, 1975." 29 U.S.C. § 1061(b)(2) (1982). In *Cohen v. Martin's*, 694 F.2d 296 (2d Cir. 1982) (per curiam), this court affirmed the district court's dismissal of a complaint in which the plaintiff alleged that his former employer had violated ERISA's vesting provisions by terminating his pension benefits. The court held that, since the employer's pension plan existed prior to January 1974, ERISA's vesting standards section became effective in the plan year beginning January 1, 1976. *Id.* at 298. Further, the court held that since plaintiff had retired in 1973, before § 1053 became effective, ERISA's vesting standards section did not apply to his claim.

Here, the Plan was in existence on January 1, 1974; ERISA's vesting standards section became effective in the plan year beginning January 1, 1976; and Lamontagne ceased to work in covered employment in September 1971. Since he left covered employment before the 1976 effective date, ERISA's vesting standards section does not apply to his claim. Therefore, the district court's dismissal of Lamontagne's vesting standards claim was correct.

C. *Plan Violation Claim*

Lamontagne contends that even if the district court had no subject matter jurisdiction over his fiduciary standards and vesting standards claims, the court had jurisdiction over his Plan violation claim. He argues that he had a

vested right to a pension under the Plan, and that ERISA, 29 U.S.C. § 1132(a)(1)(B) (1982), provides a federal cause of action to a pension plan participant who has been denied benefits due him under a plan.

Lamontagne is correct in his statement that a pension plan participant has a federal cause of action if his vested pension rights have been violated. *See Cohen*, 694 F.2d at 300. However, he is mistaken in his belief that under the subject Plan he had a vested right to a pension. After his break in employment, all of Lamontagne's pension credits were cancelled pursuant to the break in employment policy set forth in Article III of the Plan. With no pension credits, he had no right to a pension. Since Lamontagne had no vested right to a pension, the district court acted properly in dismissing his Plan violation claim.

D. *Taft-Hartley Claim*

The district court determined, and Lamontagne does not dispute, that the statute of limitations applicable to his Taft-Hartley claim is six years. *See Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980) (statute of limitations in suit under Taft-Hartley based upon six-year period set forth in N.Y. Civ. Prac. L. & R. § 213 (McKinney 1972)). Nor does Lamontagne dispute that the cause of action for this type of claim accrues when there has been "a repudiation by the fiduciary which is clear and made known to the beneficiaries." *Id.* (emphasis omitted) (quoting *In re Barabash*, 31 N.Y.2d 76, 80, 334 N.Y.S.2d 890, 893, 286 N.E.2d 268, 270 (1972)). Here, the Fund clearly repudiated Lamontagne's pension application in 1978. Lamontagne's complaint was dated January 6, 1987. Since well over six years had passed between the time Lamontagne's claim arose and the time he filed suit, the

district court correctly held that Lamontagne's Taft-Hartley claim was time-barred.

Lamontagne contends that his Taft-Hartley claim is not time-barred because an independent cause of action accrued in 1986 when the Fund denied his application for a Reduced Pension. He argues that since in 1978 he applied for a Disability Pension, not a Reduced Pension, he did not receive clear notice of the Fund's repudiation of his application for a Reduced Pension until 1986. This argument is without merit. In its 1978 letter to Lamontagne, the Fund clearly stated that he had incurred a "break in service." The Plan, to which Lamontagne was referred, makes clear that a break in employment results in the cancellation of the employee's previously earned pension credit and that without such credit, the employee has no right to any type of pension. Since the 1978 denial should have made it evident to Lamontagne that he was ineligible for any type of pension, his cause of action against the Fund for the denial of his application accrued only once, in 1978, and not again. It would be unfair to the Fund to hold that Lamontagne could revive his cause of action simply by applying for a different type of pension at a later date.

Finally, Lamontagne argues that the 1978 denial could not have triggered the statute of limitations since that denial violated ERISA, 29 U.S.C. § 1133(1) (1982), which requires that an employee benefit plan, after denying a claim for benefits, "provide adequate notice in writing to [the employee], setting forth the specific reasons for such denial." Assuming *arguendo* that a violation of § 1133(1) would prevent the running of the statute of limitations, we conclude that this argument fails since no § 1133(1) violation occurred. The Fund's 1978 letter denying Lamon-

tagne's pension application was inartfully drafted, particularly in that it referred to the age requirements for an Early Retirement Pension when Lamontagne had applied for a Disability Pension. However, the letter did clearly state that Lamontagne's "application for pension benefits . . . fail[ed] to meet the requirements for . . . a Disability . . . Pension" and that Lamontagne "had incurred a break in service." These statements provided Lamontagne with adequate notice that his application for a Disability Pension had been denied and adequately set forth the reason for that denial.

CONCLUSION

We have considered all of Lamontagne's other arguments and find them to be without merit. For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

Memorandum, Opinion and Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH L. LAMONTAGNE,

Plaintiff

- against -

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, and the BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Defendants

87 C 0074 (MJL)

MEMORANDUM OPINION AND ORDER

A P P E A R A N C E S

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MARY JOHNSON LOWE, D.J.:

Plaintiff Joseph L. Lamontagne filed this suit in an effort to obtain pension benefits under the Pension Plan ("the Plan") of the United Wire, Metal & Machine Pension Fund ("the Fund") (as amended through February 2, 1970).[1] He claims that the Fund denied his pension benefits in violation of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C.A. § 1001, et seq. (1985) ("ERISA"), and the Labor Management Relations Act, 29 U.S.C.A. § 141, et seq. (1973) ("the Taft-Hartley Act" or "Taft-Hartley"). Before the Court are (1) the Fund's motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure ("F.R.Civ. P.") 12(b)(1), (2) the Fund's motion for summary judgment pursuant to F.R.Civ.P. 56,

and (3) the Fund's motion for an order striking Lamontagne's demand for a jury trial and for punitive and extracontractual damages. For the reasons given below we grant the Fund's motion to dismiss as to Lamontagne's ERISA claims, and grant the Fund's motion for summary judgment as to Lamontagne's Taft-Hartley claims on statute of limitations grounds. We therefore need not reach the Fund's other motions.

BACKGROUND

Four types of pensions are available under the Plan: Normal, Early Retirement, Reduced, and Disability. To be eligible for any of these pensions, an employee must accumulate the number of "Pension Credits"[2] specified by the Plan. In addition, to qualify for an Early Retirement Pension, an employee must be at least 55 years old. To qualify for a Normal or Reduced Pension, an

employee must be at least 65 years old. To qualify for a Disability Pension, there is no age requirement, but the employee must be disabled as determined by the Trustees of the Fund. See Pension Plan of the United Wire, Metal & Machine Pension Fund (in Plaintiff's 3(g) Statement at Exhibit 2) (hereinafter cited as "Plan"), at Article II.

The Plan also contains a break-in-service rule. This rule is intended to limit benefits to those employees who remain in "covered employment"[3] "more of [sic] less continuously over a period of years and up to the time when they retire on a pension." Plan at Art. III, § 5(a). Under the rule, an employee's previously accrued Pension Credits are canceled if he or she works less than 800 hours in covered employment within any period of two con-

secutive calendar years or fails to have paid on his or her behalf specified amounts of contributions within such period. Plan at Art. III, § 5(b). However, the Plan states that no cancellation of Pension Credits may occur if an employee has already met both the age and the service requirements for a Normal, Reduced, or Early Retirement Pension. Plan at Art. III, § 5(d). (This vesting provision does not apply to Disability Pensions.)

A limited exception to the break rule is also available on account of disability. If an employee is absent from covered employment or otherwise fails to earr Pension Credits for up to 8 quarters due to "total disability", the absence shall be considered a "grace period," and shall not count toward a break in covered employment. The employee must, however, make a written

application to the Fund's Trustees in order to have a period of disability recognized as a grace period. Plan at Art. III, § 5(c).

Lamontagne was born on January 17, 1920. He worked in covered employment as a machinist for Detecto Scales, Inc. from 1954 to September 7, 1971, when he aggravated a back injury. He received Workmen's Compensation until April 8, 1972.

Soon thereafter, though still ailing, he applied for his old job at Detecto Scales. He was told that he could no longer perform the strenuous work required of a machinist. In an effort to secure some form of covered employment, he then went to the office of the United Wire, Metal & Machine Union. He was told that there were no jobs within covered employment which he was capable of securing. He

never returned to covered employment. Verified Complaint at ¶¶ 9-13.[4]

From 1972 through 1977 Lamontagne worked in various jobs, none of which qualified under the Plan as covered employment. During this time his health worsened, and on January 20, 1977 he left his last job. Verified Complaint at ¶¶ 15-18. On April 19, 1978 he applied to the Fund for a Disability Pension. Affidavit of E. Pauk at Exh. 3. In a letter from the Fund dated November 14, 1978, his application was denied on the grounds that he had suffered a break in covered employment five years earlier, thereby forfeiting his pension credits.[5]

On or about November 7, 1986, plaintiff applied for a Reduced Pension. By letter dated December 3, 1986, the application was denied. The Trustees, in fact,

refused to consider the application at all:

> In view of the fact that in 1978 the Board of Trustees determined that a break-in-service [sic] occurred in 1972, the Board of Trustees has determined that Mr. Lamontagne is not a participant or beneficiary within the meaning of ERISA and declined the reconsideration of their determination of 1978 ...

Affidavit of E. Pauk at Exh. 6. That 1972 break accordingly rendered plaintiff ineligible for all pensions provided by the Fund, not simply the ones for which he had already applied. Id.[6]

DISCUSSION

1. ERISA Subject Matter Jurisdiction

Where a motion to dismiss challenges the actual existence -- rather than simply the allegations -- of subject matter jurisdiction, the party invoking federal jurisdiction has the burden of proving it by legally sufficient evidence contained in affidavits or otherwise. F.R.Civ.P.

12(b)(1). Kamen v. AT&T, 791 F.2d 1006, 1011 (2d Cir. 1986); Exchange National Bank of Chicago v. Touche Ross and Co., 544 F.2d 1126, 1130-31 (2d Cir. 1976). See also Walker v. Jones, 733 F.2d 923, 935 (D.C. Cir.), cert. denied, 469 U.S. 1036 (1984). Plaintiff has not met this burden here.

Plaintiff alleges that, by "fail[ing] to reform the Plan" and by denying his pension benefits, the defendants violated their fiduciary duties under Section 404(a) of ERISA, 29 U.S.C.A. § 1104(a) (1985). He also alleges that the defendants' denial of pension benefits to him violated ERISA's minimum vesting standards, ERISA § 203, 29 U.S.C.A. § 1053 (Supp. 1988). He asserts that jurisdiction over these causes of action lies pursuant to Section 502(e) of ERISA, 29 U.S.C.A. § 1132(e) (1985). The Fund argues that there is no jurisdiction

over either the fiduciary duty provisions or the minimum vesting standards of ERISA because the acts and omissions relevant to plaintiff's cause of action preceded the dates on wich these provisions became effective. We agree.

a. Jurisdiction Over Fiduciary Duty Claim

Section 404(a) of ERISA, 29 U.S.C.A. § 1104(a) (1985), provides that a fiduciary is to discharge his or her duties

> with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

29 U.S.C.A. § 1104(a)(1)(B). In passing ERISA, Congress determined that federal courts are to have "exclusive jurisdiction with respect to [pension-related] actions involving breach of fiduciary responsi-

bility." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), reprinted in U.S. Code Congressional & Administrative News 5038, 5109 (statement of Sen. Williams). See 29 U.S.C.A. §§ 1132(a)(3), (e)(1). ERISA § 502(e), 29 U.S.C.A. 1132(e) (1985), accordingly provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by . . . a [plan] beneficiary."

However, Section 502 merely authorizes federal courts to hear suits involving a broad spectrum of pension claims. It does not purport to define particular causes of action or state when such claims become effective. Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888, 892 (1st Cir. 1978). ERISA's drafters recognized that it would be unfair to judge pre-ERISA

conduct retrospectively by ERISA's standards. See, e.g., Quinn v. Country Club Soda Co., 639 F.2d 838, 840 (1st Cir. 1981). Hence, ERISA § 514(b)(1), 29 U.S.C.A. § 1144(b)(1) (1985), provides that ERISA's preemption of state law under § 1144(a) "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." Similarly, ERISA § 414(a), 29 U.S.C.A. § 1114(a) (1985), states that, except where specifically noted, "this part [regarding fiduciary responsibility] shall take effect on January 1, 1975." Thus, in the absence of diversity, unless the cause of action arose and relevant events occurred after January 1, 1975, there is no federal jurisdiction over the claim. Menhorn v. Firestone Tire and Rubber Co., 738 F.2d 1496, 1503 (9th Cir. 1984). See

Malone v. White Motor Corp., 435 U.S. 497, 499 n.1 (1978) (ERISA "expressly disclaims" effect with respect to events prior to January 1, 1975).

Here, though the cause of action accrued after January 1, 1976,[7] the relevant acts and omissions did not. While the statute does not specify or define such acts or omissions, courts have adhered to the view they consist of "the substantial conduct forming the basis of the action." Menhorn, 738 F.2d at 1501; Cowan, 586 F.2d at 895; Martin v. Bankers Trust Co., 565 F.2d 1276, 1278-79 (4th Cir. 1977). Here, such conduct clearly occurred prior to January 1, 1975. Specifically, plaintiff left covered employment in April, 1972. Pursuant to the terms of the Plan and standard construction thereof by the Trustees, he suffered a service break as

of then. The subsequent denial of plaintiff's pension application was simply the "inexorable consequence" of the Trustees' pre-1975 decision; it involved no exercise of discretion under or interpretation of the Plan, and therefore cannot be considered conduct which formed the basis of the action. Menhorn, 738 F.2d at 1502. Thus, there is no jurisdiction over plaintiff's fiduciary duty claim.

b. Jurisdiction Over the Minimum Vesting Claim

Section 203 of ERISA, 29 U.S.C.A. § 1053 (Supp. 1988), prescribes the minimum vesting standards required of a pension plan. "Each pension," the provision reads, "shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and" a specified duration

of service. ERISA § 203(a), 29 U.S.C.A. § 1053(a). ERISA further defines an "employee" as "any individual employed by an employer." 29 U.S.C.A. § 1002(6) (Supp. 1988). An employee is to be distinguished from a plan "participant," who is more expansively defined as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . ." 29 U.S.C.A. § 1002(7) (Supp. 1988).

The effective date of ERISA's minimum vesting provision is governed by ERISA § 211(b)(2), 29 U.S.C.A. § 1061(b)(2) (1985), which states that "in the case of a plan in existence on January 1, 1974, this part shall apply in the case of plan years beginning after December 31, 1975." Section 203 thus provides a federal cause of action only to those who were employed by a plan employer as of January 1, 1976.

Cohen v. Martin's, 694 F.2d 296 (2d Cir. 1982). Since plaintiff left covered employment in 1972, no pension rights had vested on his behalf. There is thus no jurisdiction to consider his minimum vesting claim. Id. at 298-300. See also Wiesner v. Romo Paper Products Corp. Employees' Retirement Plan, 514 F.Supp. 289 (E.D.N.Y. 1981); Nostrome v. Consolidated Edison Co. of New York, 504 F.Supp. 507 (S.D.N.Y. Keller v. Syracuse China Corp., 473 F.Supp. 459 (N.D.N.Y. 1979); Blazquez v. New York City District Council of Carpenters Pension Fund, 463 F.Supp. 727 (S.D.N.Y. 1979).[8]

2. Taft-Hartley Statute of Limitations

Section 302(e) of the Taft-Hartley Act, 29 U.S.C.A. § 186(e) (1978), grants federal courts jurisdiction to remedy "structural" defects in pension plans

established pursuant to § 302(c)(5), 29 U.S.C.A. § 186(c)(5) (Supp. 1988). Subsection (c)(5) bars payments by employers to employee representatives unless such payments are "to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer . . . ." Lamontagne alleges that the Plan contains two structural defects. First, he says that the Plan's break-in-service provision operates to deny benefits to some applicants with substantially greater service than others who receive benefits. Second, he claims that the Plan's grace period provision, as construed by the Trustees, is only applicable to participants who return to covered employment after a break, thus causing an arbitrary distinction between a break suffered during, and one suffered at the

end of, a period of covered employment. Plaintiff's Memorandum of Law at 32-33.

We need not consider the jurisdictional[9] or meritorious aspects of plaintiff's Taft-Hartley claims because they are barred by the statute of limitations. We accept as true plaintiff's position that the statute of limitations governing the Taft-Hartley claim is six years. This is based on N.Y. Civ. Prac. L. & R. 213 (McKinney 1972 & Supp. 1988). See Valle v. Joint Plumbing Industry Board, 623 F.2d 196, 202 n.10 (2d Cir. 1980).

As mentioned above, a cause of action under Taft-Hartley accrues when there is a clear denial of benefits. Miles v. New York State Teamsters Conf. Pension Fund, 698 F.2d 593, 598 (2d Cir. 1983). In this case that denial occurred no later than November, 1978 when the Trustees denied

Lamontagne's application for a Disability Pension. The statute of limitations had therefore run by November, 1984. The complaint in this action was filed in January, 1987. Plaintiff's action is thus time-barred.

Plaintiff argues that the statute of limitations has only run on his rights to a Disability Pension, since that is solely what he had applied for and been denied, and that the statute has yet to run on his rights to a Normal Pension, for which he applied in November, 1986. We disagree. In accordance with the Plan's provisions, the Trustees denied Lamontagne's application for a Disability Pension because his service break had cancelled his accrued Pension Credits. It is plain from the terms of the Plan and the construction thereof by the Trustees that such a cancel-

lation applies to all pensions under the Plan, not just to a particular pension for which an employee has applied. See Plan at Article III, § 5; Affidavit of E. Pauk at Exh. 6 (December 3, 1986 Letter from S. Meyer, Attorney for Pension Fund, to Edgar Pauk, Esq., Attorney for Plaintiff).

For the above reasons, the complaint is dismissed.

It Is So Ordered.

Dated: New York, New York
July 7, 1988

/s/_____
MARY JOHNSON
United States District Judge

FOOTNOTES

[1]Because the defendant Trustees administer the defendant Pension Plan, because plaintiff's five causes of action are asserted jointly against both defendants, and because he does not otherwise significantly distinguish between defendants in the pleadings, this opinion shall refer to the defendants as "the Fund."

[2]The term "Pension Credit" is defined by the Plan as "the years in quarters of years of credit for work . . . which are accumulated and maintained for employees. . . ."

[3]"Covered Employment" is defined by the Plan as "(a) employment for which Past Service Credit is granted in accordance with Article III hereof, and (b) employment with an Employer for which contributions are paid to the Pension Fund and for which

Future Service Credit is granted in accordance with ARticle III hereof." Plan at Art. I, § 7. In essence, covered employment is work which is counted toward an employee's pension.

[4]Lamontagne states that he went to the Fund's office and informed someone there that he was disabled and in dire financial need. He was, he says, told to wait until he reached age 55 to apply for a pension. He was at that time 52 and, having worked for longer than 15 years, possibly qualified for a Disability Pension. He did not, however, apply for such a pension. Since he has not plead these facts as a cause of action, we need not pass on the legal significance, if any, of them.

[5]The five-year figure appears to be erroneous. It is undisputed that the Trustees calculate a break from the time an

employee leaves covered employment. Def.'s Memorandum of Law at 9. Plaintiff left covered employment in 1972. Thus, Plaintiff's break appears to have occurred six years prior to the time of his application.

The letter also appears to be unresponsive to the particular type of pension for which plaintiff applied. Plaintiff applied for a Disability Pension, which, again, contains no minimum age requirement. The Fund's letter, though, states in relevant part that "at the time of your [1972] termination you were 52 years of age. To be eligible for an Early Retirement Pension then you had to be 55 years of age. Therefore, todate [sic] you had incurred a break in service of 6 years. . . ." The letter nowhere specifically refers to a Disability Pension. Nevertheless, the

Fund's finding that a break occurred in 1972 is dispositive of plaintiff's eligibility for a Disability Pension, since such a break in service forfeits Pension Credits for all Plan pensions, and since he never applied for a "grace period" exemption from the break-in-service provision.

[6]On the motion, Lamontagne offers a novel though unpersuasive argument that he suffered no break in service in 1972 for purposes of an Early Retirement Pension. He argues that since he left covered employment in 1972, and since the Plan defines a break as any period of two consecutive calendar years in which an employee fails to work 800 hours in covered employment, his break should be construed to have occurred on January 1, 1975, 16 days before his 55th birthday (when his rights would have vested in an Early

Retirement Pension), and four months after the enactment of ERISA. Since, the argument continues, a break can be excused for up to 8 quarters by totl disability, and since plaintiff was totally disabled, he is entitled to a "grace period" covering those 16 days. Plaintiff's Memorandum of Law at 6-7.

However, as stated above, it is undisputed that the Trustees have consistently calculated a break in service from the time the employee leaves covered employment. Plaintiff's Memorandum of Law at 9. In order for plaintiff's calculation to even be considered, he would have to establish that defendant's calculation was arbitrary and capricious, which he has not even alleged. See Dellacava v. Painters Pension Fund of Westchester and Putnam Counties, No. 87-7978 (2d. Cir. June 10, 1988); Miles

v. New York State Teamsters Conf. Pension Fund, 698 F.2d 593 (2d Cir. 1983). Moreover, plaintiff has failed to make written application to the Trustees for a 16-day grace period, as he must do under the terms of the Plan. Plan at Art. III, § 5(c).

[7]The date of accrual is deemed to be the date on which an application for pension benefits is denied. Miles v. New York State Teamsters Conference Pension Fund, 698 F.2d 593, 598 (2d Cir. 1983). Lamontagne's application was denied in 1978.

[8]Because plaintiff never had a vested right to a pension under either a pre-ERISA or ERISA plan, the Court need not consider, as plaintiff suggests, those cases which hold that ERISA provides a federal forum for wrongful termination of benefits which vested prior to ERISA's effective date.

See Cohen, 694 F.2d at 299-300, discussing Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), Van Fossen v. International Brotherhood of Teamsters, 649 F.2d 1243 (7th Cir. 1981), and Reiherzer v. Shannon, 581 F.2d 1266 (7th Cir. 1978).

[9]As the Second Circuit has recognized, "[t]he scope of federal jurisdiction under sections 302(c)(5) and (e) is far from settled." Local 50, Bakery and Confectionary Workers Union v. Local 3, Bakery and Confectionary Workers Union, 733 F.2d 229, 233 (2d Cir. 1984). Generally, this Circuit has adhered to the "narrow" view that Section 302(e) neither authorizes courts to examine the propriety of a pension denial under the terms of a plan or administration by trustees, nor gives courts "a roving jurisdiction over even the structure of pension plans." Riley v. MEBA

Pension Trust, 570 F.2d 406, 412 (2d cir. 1977) (Friendly, J.). Local 50, 733 F.2d at 234 (reaffirming the so-called narrow view). Nevertheless, "so long as plaintiff's claim that the section has been violated is not 'wholly insubstantial and frivolous,' jurisdiction exists." Lugo v. Employees Retirement Fund of Illumination Products Industry, 529 F.2d 251, 256 (2d Cir. 1976) (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)). Although tenuous, plaintiff's allegations of structural defects in the Plan do not appear to be insubstantial and frivolous.

APPENDIX C

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventeenth day of March, one thousand nine hundred and eighty-nine.

PRESENT: Hon. THOMAS J. MESKILL
Hon. LAWRENCE W. PIERCE
Hon. ROGER J. MINER
Circuit Judges

88-7703

JOSEPH L. LAMONTAGNE,

Plaintiff-Appellant,

V

PENSION PLAN OF THE UNITED WIRE, METAL & MACHINE PENSION FUND, THE BOARD OF TRUSTEES OF THE UNITED WIRE, METAL & MACHINE PENSION FUND,

Defendants-Appellees.

(Filed March 17, 1989, Elaine B. Goldsmith, Clerk, By: FRED M. CASSIDY, Chief Deputy Clerk.)

A petition for a rehearing having been filed by Plaintiff-Appellant JOSEPH L. LAMONTAGNE.

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is DENIED.

Elaine B. Goldsmith,
Clerk

/s/_____
By: FRED M. CASSIDY
Chief Deputy Clerk

APPENDIX D: Relevant Statutory Provisions

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED

§ 1104. Fiduciary duties

(a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with

like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer

securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)-

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part

for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

§ 1144. Other laws

Supersedure; effective date

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Construction and application

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred,

before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment

companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any

agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.